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Judicial Recusal and a Minor's Right to an Abortion

Paul Danielson

I. INTRODUCTION

¶1 Controversy arises in jurisprudence, says Professor Steven Lubet, “when judges hear cases, not when they recuse themselves.”¹ Exceptions exist to every rule, of course. Recently, there have been a number of prominent news reports detailing a relatively new phenomenon whereby judges recuse themselves from hearing judicial bypass petitions by minors seeking abortions without parental consent.² A judicial bypass provision is necessary for minors who cannot or do not want to involve their parents in the abortion decision, a provision the Supreme Court has held to be constitutionally required in any parental consent statute regulating abortion for minors.³

¶2 This phenomenon is something relatively strange and new to jurisprudence. As Tennessee Circuit Court Judge Rita Stotts said recently, “I’ve been on the bench five years and I’m not aware of a situation such as this where a judge has taken a position on an entire class of cases.”⁴ But as *The New York Times* reports, blanket recusal from judicial bypass petitions is becoming more common, with over half the judges in the Shelby Circuit of Tennessee refusing to hear bypass petitions entirely.⁵ This is clearly a very controversial matter, and has sparked a lot of recent discussion in newspaper op-eds and the legal arena.

¶3 An op-ed in the Nashville-based *Tennessean* is unkind to the notion of recusal, stating that a judge’s oath of office “doesn’t come with exemptions,” and that “those who swear to uphold the laws of the nation and the state can’t pick and choose the statutes they enforce.”⁶ A counter-point op-ed appeared in the *Memphis Commercial Appeal*, arguing that the ethics rules for judges “say that any Tennessee judge must step aside and refuse to hear any case in which ‘the judge’s impartiality might reasonably be questioned,’” and stating that it was “hard to detect any burden on the system, or on the pregnant young women who bring these matters to court.”⁷

¹ Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657, 660 (1996).

² See Adam Liptak, *On Moral Grounds, Some Judges Are Opting Out of Abortion Cases*, N.Y. TIMES, Sept. 4, 2005, at S1.

³ See *Bellotti v. Baird*, 443 U.S. 622 (1979).

⁴ Bill Dries, *Abortion Law Throws Fill-In Judges For Loop—Parental Consent is Not Always Required in Tennessee*, COM. APPEAL, June 19, 2005, at A1, available at <http://www.commercialappeal.com> (click on “archives,” then do a search for the article title).

⁵ Liptak, *supra* note 2.

⁶ Editorial, *Judges Must Enforce the Law*, TENNESSEAN, Sept. 9, 2005, at 10. [hereinafter *Enforce*].

⁷ Lucian T. Pera, *Recusals Should Be Judged As Admirable Acts*, COM. APPEAL, Sept. 27, 2005, at B7, available at <http://www.commercialappeal.com> (click on “archives”; then do a search for the article title).

¶14 The Tennessee situation even prompted a group of legal and judicial ethics scholars to write a letter to the Chief Justice of the Tennessee Supreme Court, asking him to “address the propriety of judges [recusing] themselves” from this matter.⁸ The Court refused this request, however, saying that the professors “could file a formal complaint with the Tennessee Court of the Judiciary,” which is responsible for investigating judicial ethics cases and has the power to sanction judges.⁹

¶15 Clearly, this issue is important both for the specific effects it has on minors in the issue of bypass procedures, and for the broader question of recusal generally. In this article, I will lay out the history of abortion jurisprudence in the United States and specifically the judicial bypass procedure. Next I will examine the issue of judicial recusal, looking at both the history of recusal, and the judges’ interests when it comes to this particular issue, to determine whether there is a legal foundation for a judge to recuse herself from an entire class of cases with which she has a moral conflict. I will then outline the interests of minors seeking abortions without parental consent, and detail the myriad problems that already surround the issue of bypass proceedings generally. The interests of minors, when confronted with a judge who refuses to hear their cases, are both legal and medical in nature.

¶16 Next, I will look to balance the interests of judges and minors, respectively, revealing a fundamental incompatibility between the two. I assert that the minor’s interest in having access to the judicial system and obtaining a bypass proceeding trumps any potential interest asserted by judges who may be morally conflicted by the procedure. In light of this, I outline several potential solutions, and examine the theoretical and practical potential of each in turn. I conclude that the most workable solution that protects both the interests of the minor and the interests of the judge who wishes to recuse herself from bypass hearings would be to require parental consent statutes to include a provision for a constructive bypass to be provided to a minor seeking a hearing when there is no judge on hand willing to hear the case, or when the case will not be heard in a truly expedient manner.

II. BRIEF OVERVIEW OF ABORTION LAW AS IT APPLIES TO MINORS

¶17 The Supreme Court held in *Roe v. Wade* that a woman has a right to decide whether to carry her pregnancy to term.¹⁰ Subsequently, the Supreme Court has held that there may be no unwarranted intrusion into a woman’s right to make an abortion decision.¹¹ This means that, at least before viability, a State may not enact a statute or permit any action that has the effect of preventing a woman’s decision to obtain an abortion either in the form of a ban or an undue burden.¹² Things change slightly, however, when the woman in question has not reached the legal age of maturity.

⁸ Letter from Paul D. Carrington, et al. to Chief Justice Frank F. Drowota, III (Aug. 12, 2005), *available at* <http://lib.law.washington.edu/tennesseejudges.pdf> (the letter expresses the scholars’ concern over the propriety and legality of judges using blanket recusal to avoid an entire category of cases, concluding that the ethical and appropriate response would be for the judge to either set aside their moral qualms to decide the case impartially or else resign from the bench).

⁹ Liptak, *supra* note 2.

¹⁰ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

¹¹ *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

¹² *Id.* at 846.

¶8 The Supreme Court initially held in *Planned Parenthood of Central Missouri v. Danforth* that a State could not lawfully impose a blanket provision that would allow an absolute parental veto over the decision of a minor to terminate her pregnancy.¹³ Additionally, a State does not have the authority to provide any third party with an arbitrary veto over the decision between the minor and her physician to terminate the pregnancy.¹⁴ Although this holding was subsequently upheld in *Bellotti v. Baird*, the Court also clarified its position regarding the rights of minors, holding that “the constitutional rights of children cannot be equated with those of adults.”¹⁵ The Court offered three particular rationales on which to base this distinction: (1) the “peculiar vulnerability of children,” (2) children’s immaturity in making decisions, and (3) the importance of parental involvement in raising their children.¹⁶

¶9 The net result of this line of reasoning is that States could effect laws pursuant to the minor-specific interests outlined in *Bellotti*, but could not place an undue burden on a minor’s decision to obtain an abortion. Therefore, “if the State decides to require a pregnant minor to obtain . . . consent to an abortion, it also must provide an alternative procedure” to obtain the abortion, in order to prevent parents from having an arbitrary veto over the decision.¹⁷ The Court then proceeded to outline what would be required of such a procedure. The procedure would have to be (1) anonymous, (2) sufficiently expeditious to provide an effective opportunity to obtain an abortion, and (3) would entitle a minor to demonstrate that she is mature enough to make her own abortion decision, or (4) that even if she is not mature enough, an abortion is still in her best interests.¹⁸

III. WHAT LEADS TO RECUSAL?

¶10 Though the procedural requirements for parental consent statutes outlined in *Bellotti* may seem fairly clear, enacting them has produced a number of problems. For instance, there has been some question about the vagueness, and thus workability, of the “maturity” standard. One scholar has stated that “when the question before the finder of fact is one so inherently empty as determining in a few minutes the degree of a scared, pregnant minor’s ‘maturity,’ in abortion proceedings there is the likelihood whatever legal determination reached by the court is arbitrary — almost utterly without meaning.”¹⁹ However, issues of vagueness are not unique to judicial decisions over a minor’s maturity to make an abortion decision. So why are judges refusing to hear such cases?

¶11 It probably comes as little surprise that moral issues seem to be at the heart of the recusal controversy. As John R. McCarroll of Shelby County Circuit Court wrote when recusing himself from a bypass proceeding, “[t]aking the life of an innocent human being is contrary to the moral order. . . . I could not in good conscience make a finding that

¹³ 428 U.S. 52, 74 (1976).

¹⁴ *Id.*

¹⁵ 443 U.S. 622, 634 (1979).

¹⁶ *Id.*

¹⁷ *Id.* at 643.

¹⁸ *Id.*

¹⁹ Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589, 633 (2002).

would allow the minor to proceed with the abortion.”²⁰ Though other judges in Tennessee who have recused themselves declined to comment on their reasons for doing so,²¹ it is reasonable to assume that moral opposition to abortion provides the impetus for refusing to hear such cases.²²

¶12 Thus, judges who chose not to hear these cases have cited a moral foundation to justify recusing themselves from judicial bypass proceedings. But is there a legal foundation to support this act, which amounts to a judge recusing herself from an entire class of cases?

IV. BASIS FOR RECUSAL: THE JUDGE’S INTERESTS

¶13 Judicial impartiality and the right of a party to a trial before an impartial and disinterested judge have been bedrock principles of our country since its inception.²³ However, the practical meaning of these principles has varied over time. Specifically, the historical “duty to sit” doctrine has been supplanted more recently with the idea that a judge should recuse herself even in cases where only the *appearance* of impartiality reasonably exists.²⁴

¶14 Generally, this duty of recusal occurs under specific circumstances relating to the specific case at hand (i.e., when a judge has personal knowledge of disputed evidentiary facts, a personal bias or prejudice concerning a party or a party’s attorney, or a direct personal or fiduciary interest in the outcome of the litigation).²⁵ When it comes to recusal for bias, this bias must be a personal bias toward a particular party, and not a general or judicial bias.²⁶ In fact, disqualification of a judge is permitted, but “not required because the judge has definite views about the law pertaining to the case.”²⁷

¶15 Conspicuously lacking from these grounds for recusal is any express language mandating recusal for bias toward a particular legal issue, or class of cases generally. In fact, just the opposite is stated above regarding a judge’s views toward a particular law. Contrary to this, however, the Eighth Circuit has stated that “[r]egardless of personal discomfort with the law, it is the duty of judges to apply it. If they cannot do so with a clear conscience, then they should remove themselves from this class of cases.”²⁸ This would seem to suggest that recusal is in fact mandatory for a judge with a moral conflict with a particular law that would prevent her from applying it objectively. In addition to

²⁰ Liptak, *supra* note 2.

²¹ *Id.*

²² Editorial, *Recusal As Judicial Defiance*, 181 N.J.L.J. 1190 (2005). [hereinafter *Defiance*]; See also Liptak, *supra* note 2.

²³ Hon. D. Duff McKee, *Disqualification of Trial Judge for Cause*, in 50 AM. JUR. PROOF OF FACTS 3D 449 at § 3 (1999) (citing *In re Murchison*, 349 U.S. 133 (1955) and stating that “[i]t is a matter of fundamental due process that a party is entitled to a trial before an impartial and disinterested judicial officer”) [hereinafter *Disqualification*].

²⁴ *Id.* at 457-58. The historical view held that a trial judge was required to remain on a case unless it was clearly improper to do so, in other words a “duty to sit,” evidenced by a review of older cases indicating a great reluctance to force the recusal of a trial judge except for in extraordinary circumstances. The article states that this doctrine has since been abandoned in favor of the modern standard, which emerged in the early 1970s.

²⁵ *Id.* at 461-78.

²⁶ *Id.* at 473.

²⁷ *Id.* (citing *United States v. Conforte*, 624 F.2d 869 (9th Cir. 1980)).

²⁸ *T.L.J. v. Webster*, 792 F.2d 734, 739 n.4 (8th Cir. 1986).

language like this, perhaps it is possible to draw out more grounds for recusal by further examining the principles outlined above, namely those relating to personal bias and direct personal interest in the outcome of the case.

¶16 The rationale for recusal expressly stated by at least one judge in the case of judicial bypass proceedings is a personal moral objection to abortion and a refusal to issue a holding that would lead to a minor obtaining one.²⁹ If a judge feels a strong moral conviction that no minor would ever be mature enough to make the decision to obtain an abortion, or is morally convinced that it is never in a minor's best interest to obtain one, this bias would go beyond the appearance of impartiality and into the realm of prejudging cases. Indeed, if a reasonable person would have a suspicion or reasonable inference that a judge would be influenced by a particular circumstance, this is sufficient to require recusal.³⁰ Thus, a judge's moral background could effectively prevent her from issuing an impartial decision, or appearing to do so, and recusal would be appropriate.

¶17 A peculiar example of how this could play out is Catholic judges, who may suffer an automatic conflict of interest when it comes to hearing abortion cases.³¹ The story goes like this: during the 2004 presidential campaign, Catholic bishops threatened to exclude Senator John Kerry from the Eucharist because of his support for *Roe v. Wade*.³² As judges must disqualify themselves simply for a financial interest in a particular case, the argument for recusal is likely stronger when the interest in question is full Communion and the promise of eternal life.³³ Therefore, it would seem as if judges who subscribe to a belief system wherein being complicit in an abortion decision could threaten their spiritual well-being, they should not hear that class of cases for an unquestionable appearance of impartiality.

¶18 What is problematic about this approach is that if we decide that our judicial system cannot sustain judges who recuse themselves from entire classes of cases, and if the moral beliefs of members of a particular religion would require their recusal from an entire class of cases, we would essentially be drawn into an unconstitutional religious test for office. Fully exploring this problem would require a much more substantive analysis beyond the scope of this article, so I will leave it at merely identifying the issue. Leaving this aside, however, there is a flip side to this coin wherein recusal may not be required due to a personal moral belief.

¶19 Mandatory disqualification of a judge "is not warranted when a judge's impersonal prejudice arises from the judge's background experience."³⁴ Therefore, a judge's moral background is not by itself a mandatory disqualifying factor when it comes to hearing any particular type of case. Indeed, Tennessee Circuit Court Judge Rita Stotts says that she herself has "some concerns" about abortion, but she feels "duty bound by virtue of my having taken the oath of office" to rule impartially in these matters.³⁵ This tracks with the

²⁹ Liptak, *supra* note 2.

³⁰ *Disqualification*, *supra* note 23, at § 14.

³¹ Christopher D. Morris, Editorial, *Stopping a Judicial Conflict of Interest*, BOSTON GLOBE, August 9, 2005, at A21.

³² *Id.*

³³ *Id.*

³⁴ *Eldridge v. Eldridge*, 137 S.W.3d 1, 7-8 (Tenn. Ct. App. 2002), *appeal denied*, (Mar. 10, 2003) (explaining that merely because a judge has strong feelings about certain behavior, this does not require her to recuse herself from a case, even if one of the parties in the case has engaged in such behavior, thus suffering the "judge's wrath.").

³⁵ Dries, *supra* note 4.

notion that “although a judge has an obligation to recuse whenever there is good reason to do so, the judge has an equal obligation not to recuse when there is no reason to do so.”³⁶ In fact, there is reason to believe that, in the case of judicial bypass, recusal is especially inappropriate unless a judge’s moral beliefs are so strong that it would be utterly impossible for her to issue a fair ruling.³⁷

¶20 One recognized circumstance wherein a judge is exempted from the requirement of recusal is when “no practical alternative remains for resolution of the litigation if the judge withdraws.”³⁸ This is more commonly known as the “rule of necessity,” and generally occurs when there is no other judge to step in and try the case.³⁹ There are many instances where this is precisely the case when it comes to bypass petitions. Briefly, the temporal nature of the abortion decision combined with the burdens of travel in many rural areas can combine to create a circumstance where a minor would effectively be denied access to a bypass procedure in time to obtain an abortion if the local judge(s) decided to recuse themselves from hearing the petition.

¶21 In sum, it is unclear whether a judge should sit or recuse herself when it comes to bypass cases. While the Eighth Circuit suggests recusal should be mandatory if a judge feels she is biased, other principles mentioned above suggest that a judge should put aside her personal morals to apply the law, especially if no alternative exists. Of course, if the judge’s moral objections are indeed so strong as to preclude an unbiased ruling, then putting aside these beliefs becomes an impossible proposition. In other words, if a judge truly feels her personal moral principles will not allow her to provide the minor with a fair and impartial hearing, we are led into a paradox by which the same action, i.e., recusal, can simultaneously be viewed as the right and wrong action for the judge to take. The question then becomes which of these alternatives is worse for the minors, and which is worse for our judicial system?

¶22 To state the issue in other terms, a judge is demonstrating a lack of respect for the law, and to the oath she swore upon taking office, if she selectively enforces the law by refusing to hear an entire class of cases. In other instances, “the law is relatively clear that an employee’s private religious beliefs may not compromise a public duty owed by that public servant” (e.g., firefighters and police officers may not recuse themselves from having to protect those with whom they disagree for religious or any other reasons).⁴⁰ It is unclear why judges should be an exception to this principle when it comes to performing their sworn duties.

¶23 Alternately, in recusing herself, the same judge is performing her legal duty by avoiding a situation in which a party before the court might be subject to a trial conducted by a biased decision maker. Thus, the same action is either a noble one, predicated on the

³⁶ *Disqualification*, *supra* note 23, at 475 (citing *Tonkovitch v. Kansas Bd. of Regents*, 924 F. Supp. 1084 (D. Kan. 1996)).

³⁷ This standard is, of course, problematic because the strength of a moral belief is subjective, and thus contingent on a judge’s self-reporting.

³⁸ *Disqualification*, *supra* note 23, at 479.

³⁹ *Id.*

⁴⁰ Darryll M. Halcolmb & James R. Jones, *Culture Shock in the Workplace: The Legal Treatment of Cultural Behavior Under Title VII*, 29 OKLA. CITY U. L. REV. 139, 154 (2004), (citing *Rodriguez v. City of Chi.*, 156 F.3d 771, 779 (7th Cir. 1998)).

bedrock notions of fairness and impartiality, or the ultimate example of the “judicial activism” decried by so many pundits of late.⁴¹

¶24 Either way you look at it, this presents a conundrum for legal ethics. Some legal scholars have argued that government employees, specifically attorneys (and perhaps judges as well), should have their right of conscience protected by statute.⁴² The argument analogizes the already-accepted “conscience clauses” whereby physicians may suffer no penalty for refusing to perform abortions.⁴³ According to this doctrine, a professional “should be entitled to have his or her personal scruples respected to the extent that is reasonably practical.”⁴⁴ As the right-of-conscience advocates put it, there must be a “compelling reason” to put a person in the situation of having to decide whether to “leav[e] his job or violat[e] his conscience.”⁴⁵

¶25 In the case of abortion, however, there is a practical effect on minors that certainly seems to rise to the level of a “compelling reason” that would outweigh any personal moral conflicts on the part of the judges. Recusal by judges in many instances may effectively deny a pregnant minor access to the courts, effectively denying her the opportunity to exercise her constitutional rights. Thus, the interests of judges in recusing themselves must be weighed against the interest of the minors who seek bypass petitions.

V. BLANKET RECUSAL GENERALLY

¶26 Before getting to the specific issue of recusal from bypass petitions, it is worth briefly examining whether the general practice of recusal from an entire class of cases is something we want to condone. If it is permissible or acceptable generally, then we will have to look specifically at the issue of bypass hearings to determine how and why it is problematic in this area. As was discussed in the prior section on recusal, it is unclear, based on the legal principles of judicial recusal and the duty of office, whether a judge may recuse herself from an entire class of cases if she feels there will be a conflict in each and every case. Therefore, a theoretical discussion is warranted.

¶27 A good place to start is asking whether we would think it acceptable to extend this principle of allowing judges to recuse themselves from all bypass petitions to other classes of cases. For instance, would we allow a sitting judge with a deep moral objection to the death penalty to recuse herself from all criminal cases in which the death penalty might be applied by law? What about a judge with deeply held racist beliefs who refused to hear all affirmative action cases?⁴⁶ Clearly this could throw a wrench into the cogs of our justice system depending on the number of judges who decide they have moral conflicts with particular laws and thus types of cases. Though some might say that sliding down this slippery slope is unlikely at best, allowing judges to recuse themselves

⁴¹ “Judicial activism” is generally defined as “legislating from the bench,” in other words, those cases where the judge does not apply the law in a strict fashion because she disagrees with what the substantive outcome would be.

⁴² Ralph Nader & Alan Hirsch, *A Proposed Right of Conscience for Government Attorneys*, 55 HASTINGS L.J. 311 (2003).

⁴³ *Id.* at 325.

⁴⁴ *Id.*

⁴⁵ *Id.* at 327.

⁴⁶ While racist beliefs are clearly not considered “moral” in our society at this time, they were once widely accepted, and are thus presented for purposes of analogy to the contentious moral issue of abortion.

when there is not a specific conflict of interest particular to that party or case would set a precedent that would have the potential to render the legal system impotent.⁴⁷

¶28 On the other hand, we might ask if we can “conjure a case involving law constitutionally secure and lawfully in force which, for reasons of personal morality, a judge could or should, without consequence, refuse to adjudicate.”⁴⁸ Some would say yes, arguing that judges should not be forced to resign if they feel they must recuse themselves for reasons of personal morality, because “the legal system can sustain their acts of conscience.”⁴⁹ Perhaps such instances will be infrequent, and obviously the extent to which allowing this practice would hamper our legal system depends on how common the practice becomes, as well as the number of cases brought under these bypass statutes. It seems as if most judges would set aside their personal moral qualms to uphold the oath they swore upon taking office, as this has not cropped up as a legal issue before.

¶29 I would assert that allowing judges to recuse themselves from a particular class of cases based on moral objections is something we should avoid in our legal system, and it is something we should particularly avoid when it comes to recusal based on the specific interests of minors in having access to such proceedings.

VI. THE MINOR’S INTEREST

¶30 Even if we had no issues with judges recusing themselves from particular classes of cases generally, there are specific reasons why allowing blanket recusal in bypass procedures for minors seeking abortions is an especially unappealing proposition. The main distinction between abortion and other types of cases is the necessity for expedience in obtaining a fair and unbiased ruling. As the Supreme Court stated in the second *Bellotti* case, “the abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences.”⁵⁰

¶31 The myriad delays associated with obtaining an abortion create a problem of timeliness that a judicial recusal would only serve to exacerbate. The bypass procedure is already a path that is “long and lonely” for a minor seeking judicial consent to an abortion,⁵¹ without having to deal with a judge refusing to hear her case. After discovering she is pregnant, a minor must take a number of time-consuming steps, including “contact[ing] the attorney, arrang[ing] for transportation to court, and leav[ing] school without having her parents learn of the situation.”⁵² In fact, the minor may suffer an unwitting delay from not detecting her pregnancy in its early stages. Young women “often have irregular menstrual cycles, causing them to take longer to recognize that they are pregnant.”⁵³

⁴⁷ As of this writing, I have not discovered any jurisprudence on this particular issue regarding whether it is legally permissible.

⁴⁸ Defiance, *supra* note 22.

⁴⁹ *Id.*

⁵⁰ *Bellotti v. Baird*, 443 U.S. 622, 642 (1979) (the consequences include the effect on the mother’s life when burdened with a child she does not want, the medical risks associated with carrying a pregnancy to term or having an abortion later in the pregnancy, etc.).

⁵¹ J. Shoshanna Ehrlich & Jamie Ann Sabino, *A Minor’s Right to Abortion—The Unconstitutionality of Parental Participation in Bypass Hearings*, 25 NEW ENG. L. REV. 1185, 1202 (1991).

⁵² *Id.*

⁵³ Jennifer Blasdel, *Mother, May I?: Ramifications for Parental Involvement Laws for Minors Seeking Abortion Services*, 10 AM. U.J. GENDER SOC. POL’Y & L. 287 (citing *Planned Parenthood of Cent. N.J. v.*

¶32 All of these steps have the potential to significantly delay a minor seeking judicial consent. Prior to all of these delays, a minor must learn about the law that allows her to seek a bypass in the first place. Based on an Alabama case study, minors must sometimes make this discovery when even the courts themselves are not aware of or prepared for bypass petitions.⁵⁴ And if a minor is in an area where judges have recused themselves from hearing such petitions, she takes these steps only to be denied access to justice when she reaches the courtroom door.

¶33 Recusal can result in extended delays when another judge cannot be found to hear the case in an expedient manner, especially in summer months when many judges are on vacation.⁵⁵ These types of delays occur even though the holding in *Bellotti* requires bypass petition proceedings to be conducted with “sufficient expedition to provide an effective opportunity for an abortion to be obtained.”⁵⁶ This “effective opportunity” to obtain an abortion is necessary due to the myriad consequences for the minor that could result from being denied the choice to obtain an abortion.

¶34 The consequences to a minor who cannot obtain an abortion are not only numerous, but potentially severe. The Court recognized that it may be particularly burdensome to a minor due to her “probable education, employment skills, financial resources and emotional maturity.”⁵⁷ Pregnant minors may also “face special, often age-specific problems of financial insecurity, uncertain familial reaction, societal stigma, and immaturity.”⁵⁸ It is clear that minors have a very strong interest in having an opportunity to obtain an abortion should they decide not to carry a pregnancy to term for the aforementioned reasons.

¶35 Abortion is a time-sensitive matter for other reasons as well, namely the physical risks that accompany pregnancy and delaying an abortion procedure.⁵⁹ When it comes to abortion, “a woman’s health risks are lowest if she seeks care during the early weeks of her pregnancy.”⁶⁰ Additionally, though the medical risks associated with abortion are not as high as that of childbirth,⁶¹ such risks increase with every week of pregnancy beyond eight weeks.

¶36 Therefore, it is clear that delaying the abortion procedure can have medical risks for the minor in question. As evidenced above, the bypass procedure is one fraught with delays. Indeed, the American Medical Association, the American College of Obstetricians and Gynecologists, and the American Academy of Pediatricians have all repeatedly testified that minors suffer medically-problematic delays as a result of the

Farmer, 762 A.2d 620, 633 (N.J. 2000)).

⁵⁴ See Helena Silverstein & Leanne Speitel, “*Honey, I Have No Idea*”: Court Readiness to Handle Petitions to Waive Parental Consent for Abortion, 88 IOWA L. REV. 75 (2002) (detailing a case study of Alabama courts, finding a lack of awareness about bypass procedures on behalf of court officials when researchers called to request information).

⁵⁵ Ehrlich & Sabino, *supra* note 51, at 1203.

⁵⁶ *Bellotti v. Baird*, 443 U.S. 622, 644 (1979).

⁵⁷ *Id.*

⁵⁸ Matthew B. Hayhurst, *Parental Notification of Abortion and Minors’ Rights Under the Montana Constitution*, 58 MONT. L. REV. 565, 572 (1997).

⁵⁹ Silverstein & Speitel, *supra* note 54, at 111 (citing Williard Cates Jr., et al., *The Risks Associated with Teenage Abortion*, 309 NEW ENG. J. MED. 621, 623 (1983)).

⁶⁰ Blasdel, *supra* note 53, at 288.

⁶¹ *Id.*

bypass system.⁶² These statements were made before the issue of delay due to judicial recusal came into the public spotlight.⁶³

¶37 Additionally, a minor's decision to obtain an abortion may still be thwarted for other reasons, even if she manages to obtain judicial consent in a timely manner. There are many areas of the country in which abortion providers are scarce, including eighty-six counties in the United States that have no abortion provider (thirty-two percent of women of reproductive age live in those counties).⁶⁴ Clearly, these practical barriers to abortion are substantial without the minor having to seek an alternative judicial avenue when her local judge refuses to hear her bypass petition.

¶38 The delays associated with gaining access to a facility where an abortion may be obtained in many instances mirror the delays associated with obtaining judicial consent outlined above. Therefore, in many instances, having to obtain judicial consent before finding an abortion provider may serve as a double-delay that could severely increase the health risks to the minor seeking an abortion. In fact, it is easy to imagine scenarios in which this combination of delays could result in a minor effectively being denied the choice completely. Adding recusal on top of all these other delays increases the likelihood that a minor would be denied this choice.

¶39 It is clear that a minor's interest in having access to the court system to obtain an expedient and confidential hearing is extremely strong. However, we must weigh the interests of the judges above with the interests of the minors just stated.

VII. BALANCING INTERESTS

¶40 It is clear that judges who believe being complicit in an abortion decision is contrary to their moral beliefs have an interest in recusing themselves from hearing bypass petitions. As judges, they also have an obligation to uphold the part of their oath requiring them to hear each case in an impartial manner, or to recuse themselves if this is impossible. While these two things may or may not be incompatible, they are certainly incompatible with the idea that judges may not choose which laws to selectively enforce.

¶41 A judge's obligation to uphold the judicial oath seems to result in the paradox that, when it comes to a class of cases in which a judge has a direct moral conflict that could result in partiality, she has both a duty to recuse herself and a duty to avoid selectively enforcing laws. In other words, a judge who has a severe moral conflict with a particular law in a case that must be decided in an expedient manner (and thus may not be reassigned to another judge or jurisdiction depending on the circumstances), would be required both to hear and not hear the case. In the case of bypass petitions, therefore, a balancing of interests reveals that even when you take a minor's interest out of the question, there is a need to find a solution to the problems arising from recusal.

¶42 Minors have their own set of interests, the most important of which is access to the court system. If a minor cannot find a judge to hear her case in a sufficiently expedient manner, the decision will be made by default and her rights will have been denied. Given

⁶² Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT'L J.L. POL'Y & FAM. 305, 310 (2004).

⁶³ The issue is a relatively recent one, as far as I can tell, with *The New York Times* article being the first major exposition in a mainstream media news source.

⁶⁴ See Stanley K. Henshaw, *Abortion Incidents and Services in the United States, 1995-1996*, 30 FAM. PLAN. PERSP. 263 (1998).

the risks and burdens to minors associated with carrying a pregnancy to term, delaying an abortion procedure, or being forced into a back-alley abortion, it is clear that the minor's interests in obtaining an expedient hearing are paramount. Forcing a judge to eschew her moral beliefs and hear a minor's case is not in the interest of the minor or the judge, however. As will be outlined below, subjecting a minor to a judge who is biased against abortion may have the same unacceptable negative effects as denying her a hearing in the first instance.

¶43 What we have, therefore, is a situation wherein both parties' interests cannot be adequately satisfied by the current paradigm. It is imperative, therefore, that we discover a solution to this problem. In the next few sections, I will explore a variety of solutions, and examine their potential merits.

VIII. RESIGNATION, SANCTIONS, AND/OR IMPEACHMENT

¶44 As outlined above, it is important for judges to be as independent and autonomous as possible within the context of our judicial system. However, the purpose of judicial independence is not to benefit judges, but rather to "protect the public's interest in having a judiciary capable of deciding matters without fear of consequences."⁶⁵ And a fear of consequences is certainly well-founded when it comes to the issue of elected judges deciding abortion cases.⁶⁶ For instance, Judge D'Army Bailey, a judge on the circuit court in Memphis where a number of judges have recused themselves, expressed concern that his decision to hear bypass cases could have political consequences in the next judicial election.⁶⁷ "I can't keep a job constantly fearing that I'm going to lose it," said Bailey, a quote that tracks directly with the purpose of judicial independence noted above.⁶⁸

¶45 The most obvious, though certainly not the least problematic, solution to this problem would be for judges who feel that they cannot apply a particular law for moral reasons to resign from the bench. A recusal from an entire class of cases amounts to selectively enforcing the law, which runs contrary to the principles of our judicial system. Judges have been removed or disciplined for bad faith, defined as using the judicial office to "accomplish a purpose . . . beyond the legitimate exercise of judicial authority."⁶⁹ As an op-ed in the *Tennessean* put it, "if . . . judges are so strongly opposed to this or any other law, perhaps they should consider running for a legislative post."⁷⁰

¶46 Impeachment is problematic in that it is an "all-or-nothing" solution for "judicial misconduct."⁷¹ Though the impeachment option exists in nearly every state, it is limited in some states to "conduct connoting illegality," and thus does not reach other conduct

⁶⁵ Alex B. Long, "Stop Me Before I Vote For This Judge Again": *Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges*, 106 W. VA. L. REV. 1, 27 (2003) (citing *Bradley v. Fisher*, 80 U.S. (1 Wall.) 335, 349 n.16 (1871)).

⁶⁶ Liptak, *supra* note 2.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Long, *supra* note 65, at 26.

⁷⁰ *Enforce*, *supra* note 6.

⁷¹ Long, *supra* note 65, at 17.

that might demonstrate a particular judge is unfit for judicial office.⁷² In other words, judges are usually removed “only for the most egregious conduct.”⁷³

¶47 Denying a pregnant minor access to the judicial system by refusing to hear her bypass petition may rise to the level of egregious conduct, as a bypass petition may be the only way the minor can legally, and perhaps safely, obtain an abortion.⁷⁴ As was established at the outset of this article, however, a judge’s decision to recuse herself from all bypass cases may be framed in a way such that a judge is, paradoxically, performing her duty by avoiding an unfair trial.

¶48 Sanctions are another possibility that would fall short of the extreme measure of impeachment. The impetus to sanction or remove recalcitrant judges from office would generally fall on Judicial Conduct Organizations (JCOs), which exist in all fifty states, and are charged with “investigating, filing, and prosecuting complaints about judicial misconduct and . . . recommending sanctions . . . or imposing such sanctions themselves.”⁷⁵ A common ground for sanctions or removal, one recognized in the ABA’s Code of Judicial Conduct, is “willful and persistent failure to perform judicial duties.”⁷⁶ This categorization certainly seems to fit the issue of blanket recusal from bypass hearings, though once again it depends on how “duty” is classified.⁷⁷

¶49 What is problematic with sanctions or impeachment is that it may take pregnant minors seeking an abortion out of the frying pan and into the proverbial fire. Were judges with profound moral objections to abortion compelled to hear bypass cases by the threat of sanctions or impeachment, a minor, instead of having no access to the court system may gain access only to face a hostile and prejudiced judge. There are numerous examples of why this is not a good idea.

¶50 After a set of cases in Indiana where minors were denied judicial consent, word spread around the state that judges would not grant petitions and the state supreme court would always defer to these judges.⁷⁸ As a consequence of this, bypasses were only requested by four minors in Indiana’s most populous county and by one minor in its second most populous county over a period of six years.⁷⁹ In other words, due to judicial prejudice against abortion, it appears as if teens were effectively denied fair hearings and thus the exercise of their constitutional right to a bypass petition to obtain an abortion.

¶51 Thus, impeachment and/or sanctions against judges who choose to recuse themselves from bypass petition cases are not good solutions to the problems outlined above. Though the mechanisms are in place, they are not especially expedient, and are unlikely to be utilized, especially given the controversy surrounding abortion. Additionally, the threat of sanctions or impeachment might drive judges who otherwise might recuse themselves due to a feeling that they cannot be impartial to hear cases

⁷² *Id.* at 19.

⁷³ *Id.* at 37.

⁷⁴ Denying the minor’s petition on the merits, however, is a different matter.

⁷⁵ Long, *supra* note 65, at 21.

⁷⁶ MARVIN COMISKY & PHILIP C. PATTERSON, *THE JUDICIARY—SELECTION, COMPENSATION, ETHICS AND DISCIPLINE* 165, 206 (1987).

⁷⁷ Unfortunately, there seems to be no case law as of yet clarifying this matter.

⁷⁸ Steven F. Stuhlbarg, *When is a Pregnant Minor Mature? When is Abortion in Her Best Interests? The Ohio Supreme Court Applies Ohio’s Abortion Parental Notification Law*: In re Jane Doe 1, 566 N.E.2d 1181 (Ohio 1991), 60 U. CIN. L. REV. 907, 929 (1992) (citing Videotape: Abortion Denied: Shattering Young Women’s Lives (Feminist Majority 1990)).

⁷⁹ *Id.* at 930.

anyway. This is not fair to either the judge or the minor, as it either requires a judge to issue a ruling that compromises her moral principles or punishes a minor with an adverse ruling from a prejudiced judge. Clearly, another solution to the conflict must be found.

IX. THE THEORETICAL CASE TO ABOLISH BYPASS PROVISIONS

¶52 One wonders how the bypass procedure ever came into existence. For when could it possibly be in the best interests of a minor who is ruled incapable of making her own medical decisions to be forced to carry a child to term? J. Shoshanna Ehrlich has noted the apparent lack of explanation for the result reached by the Supreme Court in *Bellotti*, whereby a teen who is too immature to decide whether or not to obtain an abortion is forced to assume the responsibilities of motherhood which “entail a never-ending array of decisions with life-shaping consequences for both herself and her child.”⁸⁰

¶53 To put it another way, a teen wishing to carry her pregnancy to term has full autonomy to make pregnancy-related health care decisions, yet, for some reason unarticulated by the Court, a teen wishing to abort lacks this maturity.⁸¹ Indeed, as Ehrlich points out, the Court may have failed to explicate this further, “because there is no explanation that would bear constitutional scrutiny.”⁸² Perhaps the Court will be willing to throw itself heroically into this logical breach in a future decision, but the current controlling case law seems highly problematic.

¶54 It should be noted that the Supreme Court is unlikely to reconsider these issues, though I join the call to assert that they should, based on a wealth of research demonstrating that one of the premises the Supreme Court relied on in ruling that bypass procedures are constitutional is flawed. In *Bellotti*, the Court found that autonomy to make the abortion decision differed from that of adults for three reasons, one of which is the limited decision-making capacity of minors by virtue of their age and immaturity.⁸³ However, the Court merely presumed this was true, stating categorically that minors lacked the “experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”⁸⁴

¶55 Studies have shown that the decision-making capacity of minors, and the reasoning process they employ, for making psychological and medical decisions is equivalent to that of adults.⁸⁵ These findings demand judicial scrutiny and perhaps a shift in jurisprudence as to the maturity of minors to make these decisions. One has to wonder how the Supreme Court decision in *Bellotti* would have turned had the justices denied this premise in reaching their conclusion. It is an issue the Court should revisit, in any case.

¶56 Further supporting this notion of adolescent autonomy are recent trends in legislative treatment of juvenile criminals, in which minors are increasingly subjected to

⁸⁰ J. Shoshanna Ehrlich, *Minors As Medical Decision Makers: The Pretextual Reasoning of the Court in the Abortion Cases*, 7 MICH. J. GENDER & L. 65, 88 (2000).

⁸¹ *Id.* at 94.

⁸² *Id.*

⁸³ *Bellotti v. Baird*, 443 U.S. 622, 633-39 (1979).

⁸⁴ *Id.* at 635.

⁸⁵ Maggie O’Shaughnessy, *The Worst of Both Worlds?: Parental Involvement Requirements and the Privacy Rights of Mature Minors*, 57 OHIO ST. L.J. 1731, 1741 (1996).

adult decision-making standards and their according punishments.⁸⁶ Indeed, the disparity between the treatment of a minor's autonomy when it comes to reproductive decisions and criminal offenses amounts to no less than "legislative dissonance."⁸⁷ In this patchwork of jurisprudence, a more solid foundation based on empirical research would be helpful for resolving these seemingly disparate maturity standards.

¶57 Minors are also accorded a great deal of autonomy to make almost all other medical decisions. Indeed, in the area of medical decision-making, minors possess significant self-consent rights when it comes to pregnancy and other personally sensitive issues.⁸⁸ If minors are permitted to self-consent to medical services for pregnancy, venereal disease and drug abuse, there seems to be little justification for regulating their autonomy when it comes to the abortion decision out of a concern for their welfare.⁸⁹

¶58 Perhaps the case can be made that an abortion procedure is substantively different than these other instances, and some sort of line must be drawn to distinguish benign treatment from invasive and potentially dangerous procedures in order to determine a minor's capacity for consent. But as of now, there seems to be no principled reason why minors are held mature enough to make all pregnancy-related decisions without parental consent besides having an abortion. Thus, were the Supreme Court to revisit this issue based on this new scientific evidence, perhaps they would hold bypass provisions to be unnecessary in light of this new conception of a minor's maturity. This, in turn, would render the issue of judicial recusal from bypass hearings obsolete.

X. THE PRACTICAL CASE TO ABOLISH BYPASS PETITIONS

¶59 Whether judicial bypass procedures are a theoretically-sound proposition, their enactment in practice leaves much to be desired.⁹⁰ Generally, the implementation of judicial bypass statutes "has been highly inconsistent, leaving vulnerable minors without a meaningful bypass operation."⁹¹ Thus, legislators should move to abolish such provisions in light of these issues. Examples of problematic implementation are ubiquitous when one looks at the practical realities of the bypass procedure.

¶60 In Texas, for example, an organization dedicated to ensuring minors' access to bypass proceedings found that fewer than half of the Texas county clerks surveyed were prepared to handle the bypass petition, or even to dispense correct information when a minor inquired into the option.⁹² Additionally, judges in some counties were found to be either unaware of the law, or refused to follow procedure out of hostility to abortion.⁹³

¶61 Another recent study focused on the Alabama juvenile court system in regard to the bypass procedure.⁹⁴ As was the case in Texas, the research demonstrated that many of

⁸⁶ *Id.* at 1741-42.

⁸⁷ *Id.* at 1742.

⁸⁸ Ehrlich, *supra* note 80, at 68-69.

⁸⁹ It may be argued that the welfare of the fetus comes into play, but that is not the arguable purpose of these statutes, as minors still have the same right to an abortion as adults.

⁹⁰ See Melissa Jacobs, *Are Courts Prepared to Handle Judicial Bypass Proceedings?*, 32 WTR. HUM. RTS. 4 (2005).

⁹¹ *Id.*

⁹² *Id.* at 5.

⁹³ *Id.*

⁹⁴ See generally Silverstein & Speitel, *supra* note 54.

the juvenile courts remained poorly prepared to handle waiver inquiries due to a lack of knowledge of the law to provide minors with information upon request, despite the law having been on the books for well over a decade.⁹⁵ Additionally, some judges in Alabama also refused to comply with the law requiring a bypass hearing out of personal bias or hostility to the abortion procedure.⁹⁶

¶62 In fact, most courts in Alabama did not even inform minors of their right to court-appointed counsel, one of the basic and most important provisions of the bypass statute.⁹⁷ Even among some of the courts that were knowledgeable and prepared, minors were refused their right to a bypass proceeding due to judicial recusal, thus requiring them to travel to another county.⁹⁸ These shortcomings are unacceptable when the issue in question is a minor attempting to exercise a constitutional right.

¶63 Other practical problems include judges adding to the burden of the bypass procedure by imposing non-required and potentially unconstitutional conditions on a minor's petition. For instance, some judges in Alabama have conditioned the grant of a waiver on the requirement that minors seeking abortion are counseled from a pro-life religious organization.⁹⁹ Though this practice likely violates the Establishment Clause, attorneys who recognize the reality of obtaining a waiver for their client from judges in the "Bible Belt" are hesitant to challenge this "boulder in the pathway of abortion," saying that "no one is in a position to stop [the judges]."¹⁰⁰

¶64 Additionally, in Alabama (a problematic state, apparently), judges have begun appointing a guardian ad litem to represent the fetus in judicial bypass hearings, a practice that is "likely to gain momentum."¹⁰¹ Some have even suggested that appointing guardians to represent the fetus is the "wave of the future" in abortion regulation.¹⁰² If this is the case, it is worrisome for those who want minors to have a fair and equitable court hearing that reduces as much as possible the trauma of a minor appearing before a judge to reveal personal details of her life.

¶65 Though this practice of appointing fetal guardians will likely increase the burden on a minor seeking an abortion by turning the hearing into an adversarial procedure, it is likely constitutional and consistent with federal precedent.¹⁰³ Indeed, as long as the State articulates its interest in protecting potential life, guardianship appointments will be consistent with the *Casey* framework.¹⁰⁴ It is relevant to point out all these issues, however, because it is possible that even if the Supreme Court would uphold them individually, they may combine to create an undue burden in particular cases.

¶66 There are also practical issues at the other extreme, when the bypass procedure seems unnecessary or superfluous in areas where judges find that most minors are mature

⁹⁵ *Id.* at 87.

⁹⁶ *Id.* at 76.

⁹⁷ *Id.* at 97.

⁹⁸ *Id.* at 103.

⁹⁹ Helena Silverstein & Kathryn Lundwall Alessi, *Religious Establishment in Hearings to Waive Parental Consent for Abortion*, 7 U. PA. J. CONST. L. 473, 475 (2004).

¹⁰⁰ *Id.* at 531-32.

¹⁰¹ Helena Silverstein, *In the Matter of Anonymous, A Minor: Fetal Representation in Hearings to Waive Parental Consent for Abortion*, 11 CORNELL J.L. & PUB. POL'Y 69, 70 (2001).

¹⁰² See CARROLL DALE SHORT, *THE PEOPLE'S LAWYER: THE COLORFUL LIFE AND TIMES OF JULIAN L. McPHILLIPS, JR.* 305-27 (1st ed. 2000).

¹⁰³ See Silverstein & Speitel, *supra* note 54.

¹⁰⁴ *Id.* at 103.

in making their decision. This seems to be the case in Massachusetts, where the bypass procedure is ineffective as to its intended purpose. One judge in Massachusetts, who is morally opposed to abortion, has asserted that the bypass law in his state is “utterly preposterous. The court is a pure rubber stamp. All the law does is to harass kids.”¹⁰⁵ Therefore, the bypass procedure seems like nothing more than an unnecessary delay in a minor obtaining an abortion which, as mentioned above, merely increases the risks to her health.¹⁰⁶

¶67 That judicial consent is almost always granted in Massachusetts strongly indicates that minors are making mature or informed decisions about their pregnancies.¹⁰⁷ This also tracks with the theoretical argument for abolishing the bypass statutes outlined above, namely that the statutes are an unnecessary burden on minors who should be presumed mature enough to make the medical decision to obtain an abortion. Thus, there is both a theoretical and practical case to be made for abolishing parental consent statutes entirely.

¶68 Though abolishing bypass statutes through legislation seems to make a lot of sense, it is unlikely that such a thing will actually occur due to certain realities of our political system. Such statutes offer a wealth of political capital to politicians “who can suddenly be pro-life, pro-choice, and pro-family all at once.”¹⁰⁸ And though there may be psychological research supporting the notion that minors are mature enough to make this decision without the consent of their parents, it is generally clear that the conventional wisdom in our society is the opposite.

XI. MOUNTING A CONSTITUTIONAL CHALLENGE TO RECUSAL

¶69 If parental consent statutes cannot be abolished politically, perhaps they can be challenged constitutionally in light of the increasing practice of judicial recusal. A party could make an as-applied challenge to bypass statutes in those cases where judicial recusal from bypass hearings would create enough of a barrier to a minor’s right to obtain an abortion to render the statute unconstitutional. However, there are a number of problems with mounting such a challenge.

¶70 The first problem is finding a plaintiff to try the case. The Supreme Court held in *Belotti* that every parental consent statute must contain a bypass provision that, among other things, provides for an anonymous proceeding.¹⁰⁹ Bypass provisions in parental consent statutes were originally included not only for the purpose of preventing an arbitrary third-party veto over a minor’s constitutional right to seek an abortion, but also to protect the minor in those cases where informing one or both parents of the pregnancy or subsequent abortion would have untoward consequences.¹¹⁰

¹⁰⁵ Patricia Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 FAM. PLAN. PERSP. 259, 267 (1983).

¹⁰⁶ One may also argue that this is a reason for judges to take bypass provisions more seriously; however this seems unlikely unless the Supreme Court clarifies the standard of maturity to be more workable and consistent.

¹⁰⁷ J. Shoshanna Ehrlich, *Journey Through the Courts: Minors, Abortion and the Quest for Reproductive Fairness*, 10 YALE J.L. & FEMINISM 1, 18 (1998).

¹⁰⁸ Sanger, *supra* note 62, at 314.

¹⁰⁹ *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979).

¹¹⁰ *Id.*

¶71 The type of minor most likely to be injured by judicial recusal is probably the type of minor who is least likely to volunteer as a plaintiff for the purposes of challenging a bypass statute. Studies have shown that the large majority of pregnant minors choose to involve their parents in the decision to obtain an abortion or carry a pregnancy to term.¹¹¹ The bypass procedure is only a preferred and necessary option for those minors who feel they cannot involve their parents, whether out of fear of harming family relations, being prevented from obtaining an abortion by a controlling parent, or even physical abuse. However, the relatively small number of minors who may be affected by the recusal issue does not make it any less important or consequential for them.

¶72 For pregnant minors who do not want to involve their parents in the abortion decision, it is already hard (and potentially dangerous) to remain anonymous in the face of the attendant difficulties associated with obtaining a judicial bypass. To start, a young woman “must find a way to place the initial call to the courthouse to begin the waiver process.”¹¹² Indeed, the difficulty of making even a single phone call to start the waiver process is “exponentially increased when a minor attempts to be absent from home, school, or work.”¹¹³ For all these reasons, mounting a challenge to parental consent statutes in the face of judicial recusal is problematic for the practical reason that a plaintiff may not step forward to try the case.

¶73 There are other reasons why mounting a successful challenge to any abortion law is a difficult proposition. Comparing abortion decisions to other types of constitutional analyses, Gillian E. Metzger asserts that the abortion undue burden standard is “virtually unique in its lack of protection against unnecessary and unjustified burdens on a constitutionally protected right.”¹¹⁴ Indeed, the Supreme Court upheld almost all of the regulations on abortion challenged by the plaintiffs in its *Casey* decision.¹¹⁵ This suggests that the Court “will in fact set a high threshold and perhaps only find a substantial obstacle when a regulation serves as the equivalent of outlawing abortion for those women it affects.”¹¹⁶ It is possible, however, that the further delays associated with recusal may be the proverbial straw that breaks the camel’s back when it comes to meeting this threshold.

¶74 Another problem with mounting these case-specific challenges against parental consent statutes with bypass provisions from which judges recuse themselves is the inconsistency with which courts rule on constitutional challenges in abortion cases. For instance, a court in North Dakota allowed a facial challenge to a twenty-four hour waiting period requirement (though ultimately upheld the requirement),¹¹⁷ while a court in Utah dismissed a similar challenge as frivolous.¹¹⁸ In *Ohio v. Akron*, the Court rejected a

¹¹¹ See Robert Blum et al., *The Impact of a Parental Notification Law on Adolescent Abortion Decision-Making*, 77 AM. J. PUB. HEALTH 619, 619 (1987).

¹¹² *Planned Parenthood v. Farmer*, 762 A.2d 620, 635 (N.J. 2000).

¹¹³ *Memphis Planned Parenthood, Inc. v. Sundquist*, 2 F. Supp. 2d 997, 1002 (M.D. Tenn. 1997).

¹¹⁴ Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2026 (1994).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 2033.

¹¹⁷ *Fargo Women’s Health Org. v. Schafer*, 18 F.3d 526, 534-35 (8th Cir. 1994).

¹¹⁸ *Utah Women’s Clinic, Inc. v. Leavitt*, 844 F. Supp. 1482, 1487, 1495 (D. Utah 1994).

facial challenge to the bypass procedure “which conceivably could have allowed a delay of twenty-two days, including an appeal.”¹¹⁹

¶75 There are examples of potential challenges, however. Helena Silverstein and Leanne Speitel make the case that Alabama’s bypass statute, as applied, represents a “substantial obstacle” to a minor’s established constitutional right to an abortion due to time delays involved in its implementation.¹²⁰ Even if the case for an as-applied challenge could be made, however, courts seem to be hesitant to move beyond examining the facial component of parental consent laws to look at their application in fact, as noted above. Even in *Hodgson v. Minnesota*, where implementation testimony was introduced, “there was not much focus on time delay.”¹²¹

¶76 Therefore, mounting a constitutional challenge to recusal by way of an as-applied argument to parental consent statutes is a solution that leaves much to be desired in the practical sense. Finding a plaintiff in each instance would be a difficult initial step, and upon examining abortion jurisprudence, it is not clear that such a challenge would even be successful. Looking at other potential solutions that do not involve abandoning or overturning judicial bypass statutes generally is therefore imperative.

XII. CONSTRUCTIVE BYPASS

¶77 Another alternative would be to require parental consent statutes to contain provisions that would provide constructive judicial consent to any minor in a district where enough judge(s) refuse to hear judicial bypass cases so as to make an expedient and confidential hearing unlikely. Many physicians may be wary of performing an abortion without express written documentation, so for this proposal to be most effective, a notary or court employee should provide a form certifying the judge has refused to hear the bypass petition, and thus consent has been granted. This would be analogous to the issuance of a default judgment in a civil suit, where one party fails to appear in court. In fact, some states already have provisions in their parental consent statutes wherein a minor is granted constructive bypass if the hearing does not occur within a set period of time.¹²² Such provisions should be a requirement of any bypass statute in light of this growing phenomenon of judicial recusal, as it would serve to ensure a minor’s right to make the abortion decision in a timely manner.

¶78 The irony here, of course, is that a judge who refuses to hear such cases because they do not wish to be complicit in a minor’s abortion through their action in hearing a case would become complicit in a minor’s abortion through *not* hearing the case. It is really a question of how many steps removed from the actual decision a judge wishes to be in order to satisfy her moral conscience. However, as judges who recuse themselves must already be aware, minors in cases where another judge is readily available will

¹¹⁹ Ehrlich & Sabino, *supra* note 51, at 1209 (citing *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2984 (1990)).

¹²⁰ Silverstein & Speitel, *supra* note 54, at 106.

¹²¹ Ehrlich & Sabino, *supra* note 51, at 1209 (citing *Hodgson v. Minnesota*, 497 U.S. 417, 434-43 (1990)).

¹²² Stuhlbarg, *supra* note 78, at 939 n.152. Stuhlbarg discusses an Ohio statute wherein the court has nine days to enter judgment after a minor files a notice of appeal. Failure to do so “shall be considered to be a constructive order of the court authorizing” the abortion without parental notification, “and the appellant and any other person may rely on the constructive order to the same extent as if the court actually had entered a judgment” authorizing the bypass (quoting RC § 2505.073(A) (1986)).

likely, though not always, obtain a judicial bypass. Therefore, this solution seems relatively equitable for all parties involved. Additionally, in balancing the recusing judge's moral interest in not making a decision that would lead to an abortion versus the minor's interest in gaining access to the court to exercise her rights, the minor's interest seems to intuitively hold greater weight.

¶79 Whether such a provision should be required of parental consent statutes has obviously not been considered by the Supreme Court. As of this writing, a formal complaint has not even been filed in the Tennessee Supreme Court that would require the issue to be addressed by its justices.¹²³ However, such a solution certainly seems equitable, as it would ameliorate the risk that a minor's access to the court system, and thus a bypass hearing, would be denied by virtue of judicial recusal.

¶80 The only risk here is that this solution puts judges with a moral objection to abortion in the same position they would be in by holding a hearing (i.e., making a decision that directly results in an outcome contrary to their moral principles). It is conceivable in this instance that judges whose moral principles would cause them to believe that opposing abortion is more important than upholding their judicial oath to decide cases in an impartial manner might start hearing cases instead of recusing themselves.¹²⁴ This may be the case especially in those instances where electoral pressure from conservative constituents would lead a judge to do everything in her power to minimize the instances of abortion. The cases in Indiana and Alabama speak to the problems for minors when biased judges hear bypass petitions.

XIII. INNOVATION

¶81 One potential solution, at least to the problem of minors being denied access to a hearing,¹²⁵ could be the employment of modern technology. As discussed earlier, one of the main reasons the particular issue of recusal from bypass proceedings is so problematic is the time factor. The abortion decision is not one that can wait for a transfer of venue, and especially with the need to remain anonymous, travel that requires time, money, and excessive distance, can burden the minor to the extent that a judicial bypass becomes practically impossible to obtain.

¶82 If a judge in a particular area refuses to hear a bypass petition, one potential solution would be to re-assign that judge to a different jurisdiction and replace her with a judge willing to hear such petitions.¹²⁶ This can be practically problematic, however, especially if the practice of recusal becomes widespread. There are also jurisdictions such as Montana where the distance between courtrooms is such that reassignment would likely entail forcing a judge to move her place of residence, something that would

¹²³ Liptak, *supra* note 2.

¹²⁴ If judges chose to do this, however, they would be contravening their judicial oath, in which case there may be more of a case for remedies or sanctions, although the likelihood of this is low based on the Alabama case studies.

¹²⁵ The other issues of biased judges, finding an abortion provider, etc., are secondary concerns in this paper to the complete denial of any sort of a hearing. Even a hearing from a biased judge may be appealed, but without a hearing, a minor would be forced to obtain an illegal abortion or carry a fetus she does not want to term.

¹²⁶ While this may seem like a fairly draconian measure, it may be necessary in areas where there is a small number of sitting judges, or perhaps only one judge, who are unwilling to hear bypass petitions, thus denying a minor in that particular jurisdiction expedient access to a hearing.

probably be met with some resistance. Therefore, bringing different judges into jurisdictions where the sitting judge refuses to hear bypass petitions is problematic. On the flip side, as we see above, it can be an incredible burden on a minor to travel to a different jurisdiction in order to obtain a hearing from a willing judge.

¶83 This gap can be bridged by utilizing technology to allow a willing judge to hear the minor's petition with a minimum travel burden for both parties. Videotape testimony has become widely accepted in court cases where the witness, for whatever reason, cannot be present in the courtroom to give testimony in person.¹²⁷ Currently, videoconferencing technology that allows for streaming video of VHS-or-better quality is readily available at a reasonable price.¹²⁸ It would be very simple to set up a room in a courthouse where a willing judge could hold a remote hearing by video to listen to a minor's testimony and make the appropriate judgment under the requirements of the bypass provision.

¶84 A remote video hearing would solve a number of problems associated with the practical implementation of bypass hearings, as well as the issue of judicial recusal. A minor would only have to travel to the most proximate courthouse to obtain a hearing, thereby reducing the burden of time and travel as much as possible. A judge with a severe moral conflict could recuse herself with the assurance that she is not unconstitutionally denying court access to a minor. And finally, scheduling conflicts that might delay a bypass hearing, and thus increase the health risks to the minor, would be more easily solved, as any judge with jurisdiction who is willing to hear bypass cases could be available during any gaps in her schedule.

¶85 There is a clear downside to this potential solution, namely that a hearing in-person is the most preferable method for a judge to make the fact-finding necessary to issue a ruling on a bypass petition. Simply put, visual clues such as body language will be less readily apparent when scrutinized over a video connection than when viewed in person. However, at the pace with which technology is improving, and the high quality videoconferencing technology already available, this concern is most certainly outweighed by the necessity of providing minors access to the court system for an expedient, fair, and anonymous procedure. Of course, this solution would pose no guarantee that the hearing would be fair, and would not address the jurisprudential problems, but it would remedy the problem of a minor being denied a hearing altogether and is thus a step in the right direction.

¶86 The use of remote video hearings is certainly a solution worth exploring, especially in light of the fact that, despite the arguments set forth in the above sections, the Supreme Court has generally held bypass provisions to be constitutionally acceptable. Additionally, the oral arguments of a recent Supreme Court case,¹²⁹ heard after the above

¹²⁷ Article, Foundation for Contemporaneous Videotape Evidence, 16 AM. JUR. PROOF OF FACTS 3D 493 (2005). The article states that there is a growing trend in the legal system of accepting and utilizing videotape technology in a variety of areas, including videotaped trials, videotaped depositions and videotaped or closed-circuit testimony of allegedly abused children.

¹²⁸ For instance, Apple Computer, Inc.'s iSight technology allows real-time, 640 x 480 (VGA) resolution videoconferencing with a broadband internet connection. See <http://www.apple.com/isight/> for further details.

¹²⁹ *Ayotte v. Planned Parenthood of N. New Eng.*, 126 S.Ct. 961 (2006). While the holding did not address this idea, as the case was about an emergency provision for the minor's health in which a doctor would not have to obtain anybody's consent, questions by Justices Scalia and Kennedy during oral arguments (Transcript of Oral Argument, *Ayotte*, 126 S. Ct. 961 (2006), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1144.pdf) suggested that a phone

section was written, suggest that teleconferencing may be a viable option for, at the very least, providing a minor with an opportunity for a bypass hearing.

XIV. CONCLUSION

¶87 The new and spreading practice of judges recusing themselves from judicial bypass proceedings is exceedingly problematic, both for our judicial system in general, and for pregnant minors who require expedient and effective access to the court system. It remains to be seen how courts will address this issue, but hopefully this article has managed to outline the basic issues associated with recusal from an entire class of cases, and the issues associated with recusal from bypass proceedings specifically. Moreover, perhaps the analysis of potential solutions will help determine the best course of action in addressing this important issue. Given the effects on minors of delaying the abortion decision or forcing minors to carry unwanted pregnancies to term, it is imperative that our judicial system effectively adjudicate their rights.

call to a judge in order to make a consent determination would be sufficient outside a purely emergency context.